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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BRIEF IN SUPPORT OF MOTION AND BILL OF COMPLAINT

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February 18, 2000

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MOTION FOR LEAVE TO FILE
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v.

STATE OF MARYLAND,

Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The Commonwealth of Virginia, by its Attorney General, Mark L. Earley, and pursuant to Rule 17 of the United States Supreme Court, moves this Court for leave to file its Complaint against the State of Maryland, for the reasons stated in the accompanying Brief in Support.

Respectfully submitted,

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February 18, 2000

THE COMMONWEALTH OF VIRGINIA'S BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

QUESTIONS PRESENTED FOR REVIEW

1. Do the rights granted to Virginia pursuant to Clause IV of the Black-Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958, apply upstream of the tidal portion of the Potomac River?

2. Do Maryland's interstate compact obligations preclude it from requiring that Virginia, its governmental subdivisions and its citizens apply to Maryland for a waterway construction permit in order to build improvements appurtenant to their properties on the Virginia shore of the Potomac River?

3. Do Maryland's interstate compact obligations preclude it from requiring that Virginia, its governmental subdivisions and its citizens apply to Maryland for a water appropriation permit in order to withdraw water from the Potomac River?

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The Commonwealth of Virginia, to establish its sovereign rights to the use of the Potomac River, submits this brief in support of its motion for leave to file a Complaint against the State of Maryland, pursuant to this Court's exclusive, original jurisdiction under Art. III, § 2 of the Constitution of the United States, and 28 U.S.C. § 1251(a).

INTRODUCTION

For more than 200 years, the Potomac River (the "Potomac" or "River") has been the subject of formal compacts between Virginia and Maryland. Under those compacts, Virginia enjoys the right to make and carry out improvements extending into the River from the Virginia shore. In keeping with those rights, the Fairfax County Water Authority ("the Authority"), a political subdivision of Virginia, desires to construct a drinking water intake structure extending into the channel of the River to provide a new intake point. Nothing in the compacts requires the Authority to obtain Maryland's approval for this; however, as a matter of comity and for ease of administration, the Authority applied to Maryland for a waterway construction permit. That was four years ago. No permit has been issued.

The United States Army Corps of Engineers gave its approval for the Authority's project more than three years ago, subject only to a successful resolution of the Maryland permit question. During the intervening years, the Authority has agreed to all reasonable suggestions by Maryland about the construction of the offshore intake, including the suggestion that the intake structure be kept at least 2½ feet below the surface of the River. Maryland officials have stipulated that such a structure would not obstruct or injure the navigation of the River, nor disturb fisheries, nor adversely affect the River's aesthetic beauty. Maryland also concedes that the project would save Virginia millions of dollars in solids-handling costs. Still, the permit has not been issued.

Instead, Maryland officials, under pressure from Maryland State legislators and from the Maryland Governor, have insisted that Virginia demonstrate to their satisfaction the necessity for

the offshore intake. Nothing in the compacts permits Maryland to decide whether Virginia "needs" to construct improvements appurtenant to the Virginia shore.

More than one million Virginians depend on the Potomac River for their water. The existing intake on the Virginia shore withdraws water that is significantly inferior to water in the channel, making it more expensive to treat and less reliable as a source of clean, healthful water. The Virginia Commissioner of Health has found that constructing the offshore intake is an essential public health initiative.

Maryland denies that Virginia has compact rights above the tidal reach of the Potomac River and insists that it may regulate Virginia's access to and use of the River. Unable to resolve its dispute with Maryland despite its best efforts, Virginia invokes this Court's original jurisdiction to vindicate its compact rights and to restrain Maryland's continued interference with those rights.

STATEMENT OF THE CASE

The Potomac River provides a critical source of drinking water for more than 3.5 million people in the Washington metropolitan areas of Maryland, Virginia, and the District of Columbia. The mean low-water mark on the Virginia shore is the boundary line between Virginia and Maryland. The respective rights of Virginia and Maryland concerning the River are set forth in the Compact of 1785, the Black-Jenkins Award of 1877, the Potomac River Compact of 1958 and the Low Flow Allocation Agreement of 1978. Virginia seeks through this original action to vindicate Virginia's right to use the waters of the Potomac River and to build improvements that extend beyond the low-water mark on the Virginia shore.

A. Compacts and Interstate Agreements.

1. *The Compact of 1785 Between Maryland and Virginia.*

In 1776, Virginia and Maryland disputed the location of their common boundary, Virginia claiming to the north shore of the Potomac River and Maryland claiming to the south shore.

In its Constitution of 1776, Virginia relinquished its claim to "territories contained within the charters erecting the colon[y] [of] Maryland," 1776 Va. Const. Art. XXI, *reprinted in* 9 Hening's Statutes at Large c. II 112, 118. However, Virginia retained full jurisdiction over, and use of, the Potomac River. Article XXI of the Virginia Constitution reserved for Virginia:

> the free navigation and use of the rivers Potowmack [Potomac] and Pohomoke [Pocomoke], with the property on the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon.

Id. Art. XXI.

Conflicting claims concerning the Potomac River generated serious tensions between the States. *See Wharton v. Wise*, 153 U.S. 155, 162 (1894).

Commissioners appointed by Virginia and Maryland met at Mt. Vernon in March 1785 and agreed on a thirteen-article Compact that was ratified by the legislatures of both States. 1785 Va. Acts c. XVII, *codified in part at* Va. Code Ann. § 7.1-7 (Michie 1999); 1786 Md. Laws c. I (App. A). Article VII of the Compact of 1785 provided:

> The citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, *and the privilege of making and carrying out wharves and other improvements*, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

App. A, 1786 Md. Laws c. I (emphasis added), 1785 Va. Acts c. XVII (emphasis added). Article VIII of the Compact provided, *inter alia*, that "[a]ll laws and regulations" necessary for the preservation of fish in the Potomac and Pocomoke, or for maintaining the channel and navigation thereof, "shall be made with the mutual consent and approbation of both states." *Id.* Article XIII provided for the articles to be laid before the legislatures of both Maryland and Virginia and, upon ratification, "never to be repealed, or altered, by either, without the consent of the other." *Id.*

In 1894, this Court in *Wharton v. Wise*, 153 U.S. 155 (1894), held that the Compact was valid under the Articles of Confederation when the Compact was adopted, that its validity continued after the ratification of the Constitution of the United States (except to the extent that certain of its provisions concerning commerce were superseded by the Federal Constitution), and that Congress further consented to the Compact when it confirmed the Black-Jenkins Award of 1877. 153 U.S. at 172-73.

2. *The Black-Jenkins Award.*

The Compact of 1785 did not settle the boundary dispute between Maryland and Virginia. In 1874, the general assemblies of both states mutually authorized the matter of the "true line of boundary" to be submitted to binding arbitration, with the proviso that:

> [N]either of the said states, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever.

App. B, 1874 Va. Acts c. 135; 1874 Md. Acts c. 247.

The resulting Black-Jenkins Award, named after the arbitrators, Jeremiah S. Black of Pennsylvania, and Charles J.

Jenkins of Georgia, determined that the boundary lay at the low-water mark on the Virginia shore of the Potomac River, beginning at the Virginia-West Virginia border. Va. Code Ann. § 7.1-7 (Michie 1999). Both states ratified the Award and Congress consented to it in 1879. App. D, Act of March 3, 1879, ch. 196, 20 Stat. 481, 483.

The final clause of the Award provided that:

> Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to *such use of the river* ***beyond*** *the line of low-water mark* as may be necessary to the *full enjoyment* of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

Id. (emphasis added).

3. *Maryland v. West Virginia.*

In resolving the dispute between Maryland and West Virginia concerning their Potomac River boundary, this Court incorporated portions of the Compact of 1785 and the Black-Jenkins Award of 1877 into the final decree. *Maryland v. West Virginia*, 217 U.S. 577, 578-81, 585 (1910). The Court ruled that the boundary line between the States was the low-water mark on the southern shore of the Potomac. *Id.* at 580. The Court quoted from the opinion of Black and Jenkins that:

> Virginia has a proprietary right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

Id. at 580. The Court concluded that:

> [T]he privileges reserved to the citizens of the respective states in the compact of 1785, and its

> subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river.

Id. at 580-81.

4. *The Potomac River Compact of 1958.*

In 1957, this Court granted Virginia leave to file an original action against Maryland to enjoin Maryland from abrogating the Compact of 1785 by unilaterally regulating fishing activities in the tidal portion of the Potomac River. *Virginia v. Maryland*, 355 U.S. 269 (1957); Commonwealth of Virginia, Motion for Leave to File Bill of Complaint and Bill of Complaint, *Virginia v. Maryland*, No. 11, Original (1957). The litigation was settled by the negotiation and adoption of the Potomac River Compact of 1958. App. E, Report of the Commissioners to the Governors of Maryland and Virginia, *The Potomac River Compact of 1958*, *reprinted in* Virginia House Document No. 22, at 8 (1960), *codified at* Va. Code Ann. § 28.2-1001 (Michie 1997), and Md. Code Ann., Nat. Res. § 4-306 (1999 Supp.).

Congress consented to the new Compact on October 10, 1962. Potomac River Compact of 1958, Pub. L. No. 87-783, 76 Stat. 797 (1962). While Article IX of the 1958 Compact provided for the new Compact to supersede the Compact of 1785, the new Compact expressly carried forward and affirmed the rights of Virginians concerning the use of the Potomac River, including the right to build wharves and improvements that had been expressly protected by Article VII of the Compact of 1785. Article VII, section 1, of the Potomac River Compact of 1958 states:

> The rights, *including the privilege of erecting and maintaining wharves and other improvements*, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact, and the decisions of the courts construing that portion of Article VII

> of the Compact of 1785 relating to the rights of riparian owners shall be given full force and effect.

App. E, Potomac River Compact of 1958, Art. VII, § 1 (emphasis added).

5. *Use of the Potomac River Since 1958.*

The three major water suppliers to the Washington metropolitan area are the Washington Aqueduct Division of the U.S. Army Corps of Engineers (the "Aqueduct"), the Washington Suburban Sanitary Commission ("WSSC"), a bi-county governmental agency of the State of Maryland, and the Fairfax County Water Authority, a political subdivision created under the laws of the Commonwealth of Virginia. The WSSC supplies treated water to Montgomery County and Prince George's County, Maryland, drawn from the Potomac River and the Patuxent Reservoir. The Aqueduct provides treated water drawn from the Potomac River for the District of Columbia and portions of northern Virginia, including Arlington County, the City of Falls Church and eastern Fairfax County. The Authority provides treated water for another 1.2 million people in northern Virginia. The Authority draws half of its water from the Potomac River, and the balance from the Occoquan River Reservoir in southern Fairfax County.

a. *The Low Flow Allocation Agreement of 1978.*

In Section 181 of the Water Resources Development Act of 1976, Congress conditioned federal approval for WSSC's construction of a Potomac River water diversion structure on the negotiation and execution of a written agreement providing an enforceable schedule for allocating the withdrawal of water from the River during periods of low flow. Pub. L. No. 94-587, § 181, 90 Stat. 2939 (Oct. 22, 1976), *codified at* 42 U.S.C. § 1962d-11a. This legislation led to the negotiation and execution of the Potomac River Low Flow Allocation Agreement of 1978 ("LFAA") (App. F), signed by the United States Secretary of the Army, Maryland, Virginia, the District of

Columbia, the WSSC, and the Authority.[1] The LFAA expressly recognized the riparian interests of "communities located in Virginia" to withdraw and use water from the Potomac River. (App. F at 79a). The Commonwealth of Virginia signed the LFAA and was defined as a "user" of the River "for and on behalf of herself and each of her political subdivisions and authorities (including the Authority)." (*Id.* at Art. 2(C)(1), App. F at 89a).[2]

b. *The Water Supply Cooperation Agreement of 1982.*

On July 22, 1982, the U.S. Army Corps of Engineers, the District of Columbia, the Section for Cooperative Water Supply Operations on the Potomac of the Interstate Commission on the Potomac River Basin ("ICPRB"),[3] and the three major water

1. The LFAA has the status of an interstate compact, Congress having authorized its execution in advance. *Cuyler v. Adams*, 449 U.S. 433, 441 (1981) ("Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.").

2. In Congressional hearings leading up to the enactment of Section 181 of the Water Resources Development Act of 1976 and the LFAA, Maryland representatives conceded the right of Virginia and its governmental subdivisions to use the Potomac River. Representative Gude of Maryland repeatedly recognized Virginia's "riparian interest in the Potomac." *See* Omnibus Water Resources Development Act of 1976, Hearings before the Subcomm. on Water Resources of the Senate Comm. on Public Works, 94th Cong., 2d Sess. 2008, 2009 (1976) (statement of Rep. Gude); *id.* at 2012 (stating that "Virginia's political subdivisions do have riparian rights and these are protected."). An Assistant Attorney General of Maryland similarly stated: "We recognize that the State of Virginia has riparian rights, and those rights are equivalent or equal to the riparian rights of Maryland communities, and there is no intent to take anything away from the State of Virginia." *Id.* at 2102 (statement of Warren Rich).

3. The ICPRB was created in 1940 by an interstate compact entered into between the states of Maryland, West Virginia, Virginia, Pennsylvania and the District of Columbia, and approved by Congress. 33 U.S.C. §§ 567b, 567b-1. Among other duties, the ICPRB performs analyses and studies relating to water quality, supply and demand in the Potomac River Basin.

utilities (the Aqueduct, WSSC and FCWA) signed a Water Supply Coordination Agreement (the "CO-OP Agreement") (App. G). The CO-OP Agreement established a formal system of cooperation among the three water utilities and the ICPRB to ensure the adequacy of the future water supply for the Washington metropolitan area. (*Id.*, Art. 1). The Aqueduct, the WSSC, the Authority and District of Columbia promised under the CO-OP Agreement to coordinate their use of their respective water supply systems through the ICPRB "to provide the optimal utilization of all available water supply facilities for the benefit of the inhabitants of the Washington Metropolitan Area." (*Id.*, Art. 1).

In 1982, concurrently with the execution of the CO-OP Agreement, the Aqueduct, the WSSC, the Authority and the District of Columbia also entered into a series of other cost-sharing agreements to provide storage capacity in upstream reservoirs in Maryland and West Virginia, in order to supplement the supply of water for the Potomac River in times of low flow. The coordinated operation of the region's water resources will enable the utilities to meet the area's demands, without imposing restrictions, through at least the year 2015, even under repeated recurrences of the historic drought of record.

B. Maryland Statutory Requirements Concerning the Use of the Potomac River.

Maryland requires that any person seeking to construct an improvement in the Potomac River obtain a waterway construction permit from the Maryland Department of Environment ("MDE"). Md. Code Ann., Envir. §§ 5-504, 5-507 (1996); Md. Regs. Code tit. 26, § 26.17.04 (1999). Maryland also requires that anyone seeking to withdraw water from the Potomac River obtain a water appropriation permit from MDE. Md. Code Ann., Envir. § 5-502 (1996); Md. Regs. Code tit. 26, § 26.17.06.03 (1999). MDE purports to retain the authority to deny a permit application if it determines in its sole discretion that a waterway construction project, or a water

appropriation request, is "unnecessary." A violation of the Maryland permitting statutes or regulations constitutes a misdemeanor, subject to a fine up to $500 per day for each day of the offense, not to exceed a total fine of $25,000. Md. Code Ann., Envir. § 5-514 (1996).

C. The Present Controversy.

Maryland's treatment of Virginia over the course of the past four years gives rise to the present controversy.

1. *The Authority's Offshore Intake Project.*

The Authority is a political subdivision created under the laws of Virginia, exercising "essential governmental functions to provide for the public health and welfare. . . ." Va. Code Ann. § 15.2-5114 (Michie 1997). Since 1982, the Authority has withdrawn Potomac River water through an intake located along the Virginia shoreline at Lowes Island in Loudoun County, Virginia. In the ensuing eighteen years, the Authority has experienced a number of serious problems, including periodic blockages and plant shutdowns resulting from clogging of the intake by grass, leaves, and ice. In addition, following local rainstorms, when the River has been influenced by runoff from several upstream tributaries, the raw water at the shoreline has been more difficult and expensive to treat due to high turbidity (a measurement of the amount of particulate matter suspended in the water), and low pH and alkalinity.

A comprehensive study by the Authority's outside engineering firm concluded that the Authority should construct an alternate intake 725 feet offshore from the existing intake, in the main channel of the River. The Potomac River is 2000 feet wide at that point. Offshore intakes are common across the country. The study determined that an offshore intake would reduce, if not eliminate, the Authority's operational problems arising from clogging at the shore intake, reduce solids loading at the treatment plant by 40% to 50%, and dramatically improve

the quality of the raw water. The present value associated with the reduction in solids disposal and chemical treatment costs alone would exceed $13 million.

The Authority's offshore intake would also provide significant public health benefits to Virginia. Mean turbidity at the shore is 50% greater than in the channel of the river. When local rainfall exceeds 1/2 inch, mean and median turbidity and suspended solids at the Authority's shore intake surge to more than four times that in the channel of the river, where turbidity and suspended solids levels change very little. These variable conditions significantly interfere with the smooth operation of the water treatment plant and greatly increase the risk of human error in producing finished drinking water free of contaminants. The WSSC's water intake on the Maryland shore, just downstream from Watt's Branch, experiences even poorer water quality due to local runoff in Maryland. Mean turbidity at the WSSC's shore intake is more than 30% greater than at the Authority's shore intake.

Although the Authority currently produces finished drinking water that complies with all federal and state water quality standards, high turbidity in raw water following local rainstorms is associated with elevated levels of waterborne pathogens, including *Cryptosporidium* and *Giardia*. The species *Cryptosporidium parvum* is infectious to humans and causes the disease Cryptosporidiosis. There is no current treatment for Cryptosporidiosis, a disease that causes extreme gastrointestinal illness in healthy persons and poses a risk of death for immuno-compromised individuals. An outbreak of Cryptosporidiosis in 1993 in the City of Milwaukee, attributed to contaminated source water from Lake Michigan, caused more than 100 deaths and in excess of 400,000 gastrointestinal illnesses. All waterborne outbreaks of Cryptosporidiosis detected to date, including the 1993 Milwaukee incident, occurred in communities where water utilities used conventional filtration systems that met all state and federal standards for acceptable water quality.

The U.S. Environmental Protection Agency, in its recent Interim Enhanced Surface Water Treatment Rule ("IESWTR"), 63 Fed. Reg. 69,478 (Dec. 16, 1998), requires water suppliers like the Authority to provide a 2-log (99%) removal of *Cryptosporidium* present in raw water. *Id.* at 69,483, 69,486, 69,516, *codified at* 40 C.F.R. § 141.170(a) (1999). However, because of the dangers presented by *Cryptosporidium* infection in humans, particularly the risk of death to immuno-compromised individuals, the IESWTR establishes a Maximum Contaminant Level Goal of zero for *Cryptosporidium*. 63 Fed. Reg. at 69,484-86, 69,515-16, *codified at* 40 C.F.R. § 141.52(d). The Authority's construction of an offshore intake is necessary to approach the goal of zero *Cryptosporidium* in finished water.

The treatment of highly turbid raw water also generates the production of disinfection byproducts that are known to be animal carcinogens and suspected to be human carcinogens. Using better quality source water both reduces the quantity of such disinfection byproducts in the finished drinking water and provides an additional barrier in the treatment process against waterborne pathogens.

The selection of the best available source water is also a fundamental principal of sanitary engineering that is specifically mandated by regulations of the Virginia Department of Health. 12 Va. Admin. Code § 5-590-820 (1999). The Virginia Commissioner of Health has determined that the Authority's move to an offshore intake is "an essential public health initiative for the more than one million Virginians and their visitors who use FCWA drinking water on a daily basis." (App. K).

2. *The Authority's Permit Applications.*

The Authority submitted its state and federal permit applications on January 4, 1996.

Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, prohibits the construction of any structure in the navigable waters of the United States except on plans recommended and approved by the Army Chief of Engineers of the U.S. Army

Corps of Engineers.[4] Section 301 of the Clean Water Act, 33 U.S.C. § 1311, requires a permit issued under Section 404 of that statute if any construction in the waters of the United States might result in a discharge of fill material.[5] Section 401 of the Clean Water Act further requires that the applicant obtain a water quality certification (the "Section 401 Water Quality Certification") from the State in which the discharge originates that the discharge will comply with state water quality standards.[6] The requirement of a Section 401 Water Quality Certification is waived if the State fails or refuses to act within one year after receipt of the applicant's request. *Id.*[7]

In addition to the federal permits, the Authority applied to MDE for three permits from the State of Maryland: a waterway construction permit, an amendment to its water appropriation permit to take water from a different location than the shore, and the Section 401Water Quality Certification required under the Clean Water Act.

Maryland issued the Authority a water appropriation permit in April 1996, authorizing water to be withdrawn from the proposed offshore location; no change was sought or made in the amount of water authorized to be withdrawn. On January 31, 1997, the Corps issued Section 10 and Section 401 permits to the Authority, finding that the proposed construction was "of minimal environmental consequence." (App. H). With these federal permits in hand, the Authority awaited action by MDE on the Maryland waterway construction permit and the Section 401 Water Quality Certification.

3. *Maryland Delays and Obstructs the Authority's Permit Application.*

After its application had been pending for more than a year, the Authority's offshore intake project became politically

4. 33 U.S.C. § 403; 33 C.F.R. § 320.2(b) (1998); 33 C.F.R. § 322.3(a) (1998).

5. 33 U.S.C. §§ 1311, 1344; 33 C.F.R. § 323.3(a) (1998).

6. 33 U.S.C. § 1341(a)(1). 33 C.F.R. § 320.3(a) (1998).

7. 33 U.S.C. § 1341(a)(1).

controversial. Various Maryland state legislators objected to the project and began to pressure MDE to withhold the permits.

For instance, on May 19, 1997, Maryland General Assembly Delegate Jean Cryor (Montgomery County) urged Maryland's Secretary of Environment, Jane T. Nishida, to withhold the Authority's permits, complaining that the Potomac River was "being used as a resource for Virginia's continuing economic development." (App. J). Delegate Cryor's efforts caused MDE to hold a public information hearing. At that hearing in Montgomery County, Maryland on May 21, 1997, Delegate Cryor vowed publicly that she would work to prevent the Authority's offshore intake from ever being constructed. (Bill of Complaint, ¶ 32). State Senator Jean W. Roesser (Montgomery County) likewise opposed the project and stated at the hearing that "we should call a spade a spade" and "have a clear understanding that this expanded intake accommodates Virginia's massive growth." (*Id.*).

On October 21, 1997, while the Authority's Maryland application was pending, a letter to the editor appeared in *The Fairfax Journal* from one Montgomery County, Maryland constituent, stating:

> Fairfax County residents don't know it, but Maryland has just cut your water off. Five Montgomery County representatives to the Maryland General Assembly (state senators Brian Frosh, Jean Rosser, and P.J. Hogan, and delegates Jean Cryor and Ray Beck) prevailed upon the Maryland Water Management Administration to reject the Fairfax County Water Authority request for construction of a mid-Potomac River water intake, within Maryland boundaries.

J. Webb, "Maryland Water Belongs There," *The Fairfax Journal* (Oct. 21, 1997). Following substantial political pressure from these and other Maryland state legislators, as well as from the Governor of Maryland himself, MDE's Water Management Administration ("WMA") announced its denial of the

Authority's waterway construction permit in December 1997, and refused to act on the Authority's request for a Section 401 Water Quality Certification. (App. L). WMA claimed that the Authority's offshore intake project was "unneeded" because the Authority already had a shoreline water intake providing "a safe and adequate supply of drinking water." (*Id.*). Upon information and belief, this was the first time that MDE ever denied any waterway construction permit to any applicant for any construction in the Potomac River.

Although the Governor of Maryland has no role under Maryland law in the granting or denying of waterway construction permits, the present Governor claimed, in a February 1998 letter to one of his constituents, that he had decided that the permit should be denied. (App. M). Similarly, Delegate Cryor has claimed publicly on her Internet website that her efforts were instrumental in causing MDE to withhold the Authority's Maryland permits. (Bill of Complaint, ¶ 35).

Since December 1997, the Authority has been enmeshed in convoluted administrative proceedings before the MDE with no final resolution in sight. To contest MDE's actions under Maryland law, the Authority had to submit to a "contested case hearing" procedure before an Administrative Law Judge ("ALJ") from the Maryland Office of Administrative Hearings. Under this procedure, the ALJ makes proposed findings of fact and conclusions of law to MDE, but those findings are not binding on the agency. A "Final Decision Maker," appointed in this case by MDE Secretary Nishida, then makes the ultimate determination for MDE whether to issue the permit. Thus, the same agency that withheld the Authority's permit application in the first place is directed to make the "final decision."

MDE stipulated during the contested case hearing process that the Authority's proposed offshore intake will not harm any aesthetic or boating interests and that it will not interfere with Potomac River fisheries. (App. N). MDE also stipulated that its power to withhold the Section 401 Water Quality Certification

required under the Clean Water Act was waived because of Maryland's delay in acting on the Authority's application. (App. O). MDE has conceded that the offshore intake will, in fact, save the Authority significant expense associated with solids-handling costs. Nonetheless, MDE continues to withhold the waterway construction permit, maintaining that the offshore intake is "unneeded" by Virginia because the Authority is already withdrawing and treating an adequate quantity of water from its shoreline intake to supply Virginia users. MDE also contends that, instead of the Authority's constructing the offshore intake, the Commonwealth of Virginia should take steps to eliminate the sources of sediment that impair water quality at the shoreline, even though water quality along the Maryland shore at the WSSC's water intake is demonstrably worse than on the Virginia side.

The Maryland ALJ precluded the Authority during the contested case hearing process from introducing any evidence to show that MDE's permit decision was the result of improper political influence. Nonetheless, in January 1999, after the close of MDE's case-in-chief, the ALJ ruled that the Authority's waterway construction permit should be issued. Without ruling on the Authority's compact arguments, the ALJ found that MDE was unable to demonstrate that construction of the Authority's proposed offshore intake would have any significant environmental impact.

MDE's "Final Decision Maker" in June 1999 rejected the ALJ's determination and remanded the case for additional hearings. (App. P). MDE's Final Decision Maker directed the ALJ to hear evidence as to whether the Authority "needs" the offshore intake structure. (*Id.* at 142a, 155a-157a, 166a, 168a). Like the ALJ, the Final Decision Maker declined to rule on the Authority's compact argument that Maryland did not have the right to determine for Virginia whether the offshore intake was necessary. (*Id.* at 144a). The contested case hearing was reconvened in November 1999, and the ALJ has taken the case under advisement.

Throughout the contested case hearing process, which started in December 1997, various Maryland State legislators have continued to pressure MDE to withhold the Authority's waterway construction permit, even if the ALJ ultimately recommends that the permit be issued.

On February 3, 2000, Delegate Cryor, with 30 co-sponsors, introduced legislation in the Maryland General Assembly that would effectively prohibit the construction of new water intake structures in the Potomac River until unnamed "studies" are completed at some indeterminate time in the future. (App. U, House Bill 395, Md. House of Delegates introduced Feb. 3, 2000). A companion bill has been introduced in the Maryland Senate. (App. V, Senate Bill 729, Md. Senate, introduced Feb. 4, 2000). In addition to its interim prohibitions, Delegate Cryor's proposed bill would forever prohibit the construction of any new water intake in the Potomac River unless it is a replacement for an existing water intake, thereby effectively preventing *any* additional water intake structures from being constructed by Virginia, its political subdivisions or its citizens. Delegate Cryor specifically intends her bill to prohibit the Authority's offshore intake, and the conditions set forth in her bill are tailored to accomplish that purpose, while purporting to be facially neutral. The companion Senate Bill would likewise delay indefinitely any action on the Authority's permit application. Although it purports to allow a permit to be issued pending the completion of various studies at some indefinite time in the future, the bill is intended and tailored to force the Authority to reduce drastically the capacity of its proposed offshore intake structure. Both the House and the Senate versions of the bill would prevent MDE from issuing the Authority's waterway construction permit.

Although most bills in the Maryland General Assembly, if enacted, become effective October 1 of the same year, both of these bills have an early effective date of June 1, 2000. This early effective date is intended to preempt the contested case

hearing before MDE in which the Authority is presently engaged so as to ensure that the Authority's permit application is delayed or denied. Similar legislation passed both houses of the Maryland General Assembly in 1999 but failed to become law only because the two houses were unable to resolve small differences in their respective bills in the minutes before the legislative session ended at midnight on April 12, 1999.

4. *Maryland Rebuffs Virginia's Efforts to Resolve the Matter and the Maryland Attorney General Claims that the Compacts are Inapplicable to the Non-Tidal Portion of the Potomac River.*

The Authority, since 1997, has made numerous settlement proposals to MDE to secure issuance of a waterway construction permit. (*E.g.*, App. Q, Letter of 9/23/99 from F. Morin to J. Nishida)). MDE has not identified any basis upon which it would agree to issue the permit. (App. R, Letter of 10/29/99 from J.L. Hearn to F. Morin).

On November 30, 1999, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or concur that permit approval was not required under the interstate compacts between Maryland and Virginia. (App. S). On January 4, 2000, the Attorney General of Maryland responded, contending that the highest court of Maryland had already determined that Virginia's compact rights were inapplicable to the non-tidal reach of the Potomac River, and that, even if they were, Maryland would still have the right to regulate the use of the River by Virginia. (App. T).

The Attorney General of Virginia subsequently conferred in person and by telephone with the Maryland Attorney General prior to filing this action, and was informed that Maryland would not change its position. All reasonable efforts to resolve this dispute informally have been exhausted.

5. *Maryland's Delay is Causing Irreparable Injury to Virginia and her Citizens.*

The Authority's permit application to construct the offshore intake has been pending with MDE for more than four years. No decision in Virginia's favor is reasonably foreseeable. The delay has cost the Authority and its Virginia customers, including the Commonwealth of Virginia, several hundred thousand dollars per year in unnecessary solids treatment costs which can never be recovered. The delay has also exposed and continues to expose Virginia water users to the serious risk of interrupted water supply, disinfection byproducts and waterborne pathogens that elude current treatment capabilities.

REASONS THE COURT SHOULD TAKE JURISDICTION

This Potomac River access case involves a dispute between Virginia and Maryland over the interpretation of two interstate compacts concerning the Potomac River and of a binding arbitration award addressed to Virginia's and Maryland's access to the River — the Compact of 1785, the Potomac River Compact of 1958, and the Black-Jenkins Award of 1877. For more than four years Maryland has refused to grant Virginia a permit to build a new intake in the waters of the Potomac. Virginia asks the Court to determine under the above compacts and arbitration award: 1) whether Maryland may require Virginia, its governmental subdivisions and its citizens to obtain waterway construction and appropriation permits before building improvements from the Virginia shore to obtain access to the waters of the Potomac River; and 2) whether Maryland can require Virginia to demonstrate to Maryland's satisfaction that Virginia has a "need" to construct the improvement or to withdraw water. Having previously exercised its original jurisdiction to resolve disputes between Maryland and Virginia concerning the Potomac River, the Court is uniquely equipped to exercise its original jurisdiction here to interpret relevant interstate compact and arbitration award provisions.

This case is not susceptible to expeditious resolution in Maryland administrative agency proceedings or in the Maryland courts. Anyone building a structure in the Maryland waters of the Potomac is obligated under Maryland statutes to obtain a construction permit from the Maryland Department of the Environment. More than four years ago, the Fairfax County Water Authority, in good faith and as a matter of comity, applied to MDE for that permit, believing that the permit would be readily granted. Instead, the Authority and Virginia have been subjected to inordinate delay premised, most recently, on Maryland's insistence that Virginia demonstrate that it has a "need" for the new water intake.

There is no authority in the relevant compacts and arbitration award for Maryland's position that Virginia must show that its citizens "need" the new water intake. Yet, based on Maryland's past performance, there is every prospect that, in large part for political reasons, Maryland will continue to delay for years and ultimately deny Virginia its permit, and that the Maryland courts will uphold that determination. Thus, there is no alternative forum that can provide a fair and prompt resolution of this case.

There are serious public health issues that militate against further delay and require this Court's intervention. The Authority's present water intake on the Virginia shore provides drinking water to more than 1.2 million people in Virginia. Water drawn through the present intake is adversely affected after local rainstorms and is difficult and expensive to treat. It contains elevated levels of disinfection byproduct precursors and a greater risk of waterborne pathogens that can elude current treatment capabilities. The present intake also becomes clogged with grass, leaves and ice that impair the operation of the system. Virginia has determined that the new intake, which would be safely submerged offshore, will significantly ameliorate these problems, and is an essential public health initiative.

Maryland's latest insistence that Virginia prove to Maryland's satisfaction that Virginia has a need for the new

water intake presents a direct challenge to Virginia's sovereignty. This case involves an interstate controversy concerning the authority of one state, Maryland, to intrude in a determination made by another state, Virginia, concerning what is needed for the health and welfare of Virginia's citizens. Accordingly, the case is particularly appropriate for exercise of this Court's original jurisdiction.

ARGUMENT

The Court has set forth two considerations in determining whether to exercise its original jurisdiction under Art. III, § 2, and 28 U.S.C. § 1251(a):

> Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors. First, we look to "the nature of the interest of the complaining State," [*Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)], focusing on the "seriousness and dignity of the claim," [*Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)]. . . . Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. Louisiana, 506 U.S. 73, 77 (1992). Although each of these factors is discussed in greater detail below, it should be noted at the outset that the Court has rarely declined to exercise its original jurisdiction in cases that, like this one, involve disputes concerning the interpretation of an interstate compact or competing rights to the use of an interstate stream. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the United States, and our first and last order of business is interpreting the compact.") (citations omitted).

I. The Seriousness and Dignity of Virginia's Claims Warrant Exercise of This Court's Original Jurisdiction.

A dispute concerning access to and use of interstate waters, and the interpretation of an interstate compact, is the classic case warranting this Court's exercise of its exclusive, original

jurisdiction. In *Oklahoma v. New Mexico*, 501 U.S. 221 (1991), the Court recognized its " 'serious responsibility to adjudicate cases where there are actual, existing controversies' between the States over the waters in interstate streams." *Id.* at 241 (quoting *Arizona v. California*, 373 U.S. 546, 564 (1963)). This case involves not only a dispute concerning the waters of an interstate river, but also a violation by Maryland of its interstate compact obligations with respect to that river. It is noteworthy that this Court has previously exercised its original jurisdiction to resolve disputes between Maryland and Virginia concerning the Potomac River. *Virginia v. Maryland*, 355 U.S. 269 (1957). The Potomac River Compact of 1958, whose language is also at issue here, resulted from the settlement of that case.

Maryland is violating its obligations to Virginia in two material ways. First, Maryland is obstructing Virginia's right to construct improvements appurtenant to the Virginia shore of the Potomac River that are necessary to the full enjoyment of Virginia's riparian rights, and essential to the public health of Virginia citizens, in clear violation of Article VII of the Compact of 1785, the Fourth Clause of the Black-Jenkins Award of 1877, and Article VII of the Potomac River Compact of 1958. Maryland's effort to second-guess whether the Authority or the people of Virginia "need" the offshore intake goes beyond any legitimate claim that Maryland has under these interstate agreements to see that Virginia's use of the River does not obstruct navigation, harm fisheries, or otherwise interfere with Maryland's use of the River.[8]

8. Although it is the Authority that is seeking to construct the offshore intake, the Commonwealth of Virginia has a substantial interest in the outcome of this suit that entitles it to bring this original action. *See Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982) (holding that the State of Colorado had a substantial interest in the outcome of Colorado's original action against New Mexico to apportion the Vermejo River, notwithstanding that only one private company in Colorado sought to divert water from the River, because "other Colorado citizens may jointly use the water or purchase water rights in the future. In any

(Cont'd)

Second, Maryland's appointment of itself to control through the permit appropriation process the quantity of water that Virginia can withdraw from the Potomac River violates the fundamental principal recognized in this Court's equitable apportionment cases, that "two States come to the Court on equal footing. Neither is entitled to any special priority over the other with respect to use of the water. . . . Each state through which rivers pass has a right to the benefit of the water. . . . " *Colorado v. New Mexico*, 459 U.S. 176, 191 (1982) (Burger, C.J., concurring) (citation omitted); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938). Indeed, under this Court's equitable apportionment doctrine, Maryland may not seek to prevent or enjoin the diversion of Potomac River water by Virginia unless Maryland can show that such diversion "will cause it 'real or substantial injury or damage.' " *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 672 (1931)).[9]

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event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State."); *see also United States v. Nevada*, 412 U.S. 534, 539 (1973) ("For the purposes of dividing the waters of an interstate stream with another State, Nevada has the right, parens patriae, to represent all the nonfederal users in its own State insofar as the share allocated to the other State is concerned."). In this case, the Authority provides water to 1.2 million people in Virginia. Other Virginia governmental subdivisions draw water from the Potomac, such as the Town of Leesburg, or may do so in the future, such as Loudoun County. The Commonwealth of Virginia also purchases water from the Authority. Importantly, the interstate compacts at issue were between Virginia and Maryland, not between the Authority and Maryland.

9. "This rule applies even if the State seeking to prevent or enjoin a diversion is the nominal defendant in a lawsuit." *Colorado v. New Mexico*, 459 U.S. at 187 n.13. Proof that the diversion will cause injury or damage must be by "clear and convincing evidence." *Id.* at 187; *Idaho ex rel. Evans v. Washington*, 462 U.S. 1017, 1027 (1983).

Maryland's attempt to impose a water appropriation permitting requirement on Virginia violates these principles and constitutes a direct affront to Virginia's sovereignty. The LFAA, a properly enacted compact between Virginia, Maryland, the District of Columbia, the United States and the three principal water utilities, already governs the equitable apportionment of Potomac River water in times of low flow. Maryland's efforts to control further the means or manner of withdrawal of water by Virginia is tantamount to the power to deny access to the River itself. Maryland may no more limit or regulate Virginia's withdrawals from the River than Virginia can limit or regulate Maryland's withdrawals. Such action would clearly be a " 'casus belli if the States were fully sovereign.' " *Mississippi v. Louisiana*, 506 U.S. at 77 (*quoting Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983)).

II. Virginia Has No Adequate Alternative Forum.

This Court has exclusive subject matter jurisdiction over suits between two States. 28 U.S.C. § 1251(a). There is no adequate alternative forum to resolve the Compact issues presented here.

A. The Pending Maryland Administrative Proceeding Is an Inadequate Forum in Which to Resolve Whether Maryland's Waterway Construction Permitting System Violates Virginia's Compact Rights.

The Maryland administrative proceeding is not competent to determine Virginia's rights. This Court is the only forum situated to pass fairly upon the proper interpretation of the interstate compacts and arbitration awards between Maryland and Virginia. As the Court stated in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951):

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To

> determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies, is the function and duty of the Supreme Court of the Nation.

Id. at 28 (citation omitted).

Maryland has done precisely what this passage forbids. Its courts and its Attorney General have determined unilaterally that Virginia's interstate compact rights in the Potomac River do not apply upstream of the tidal reach. (App. T). Maryland's Governor has personally intervened in the administrative permitting process to cause MDE to deny the Authority's permit application, without regard to Virginia's compact rights. (App. M). And Maryland state legislators, who have vowed to prevent the Authority from ever constructing its offshore intake, have introduced legislation in the Maryland General Assembly to accomplish that very goal. (App. U, V).

The pending administrative proceeding in Maryland (to which the Authority, but not the Commonwealth, is a party), is illegitimate and inadequate to determine Virginia's rights for four reasons. First, neither Virginia nor its governmental subdivisions should have to submit to a Maryland administrative proceeding to exercise their interstate compact rights to use the Potomac River, or to build improvements appurtenant to the shore. Maryland violates its interstate compact obligations by seeking to determine whether Virginia or its governmental subdivisions "need" to construct improvements along the Virginia shore, and by having its courts and administrative agencies assume jurisdiction to decide such questions. The putative "alternative forum" is inadequate because it is illegitimate.

Second, it would be futile to require that Virginia, through the Authority, litigate the scope of Virginia's interstate compact rights in a Maryland tribunal. That tribunal has failed to rule upon or even consider the Authority's compact arguments. More importantly, Maryland's Attorney General insists that

Maryland's highest court has *already* ruled that Virginia's compact rights in the Potomac River do not apply above the tidal reach. (App. T). Thus, the result of submitting the compact issue to Maryland's legal system has been pre-determined by Maryland.

In *Middlekauff v. LeCompte*, 132 A. 48 (Md. 1926), the Maryland Court of Appeals ruled that Maryland legislation concerning fish pots in the Upper Potomac was effective without concurrent legislation from Virginia under Article VIII of the Compact of 1785. Adopting Chancellor Bland's reasoning in *Binney's Case*, 2 Bland 99, 126 (1829), the Maryland high court held that the Compact of 1785 applied only to the navigable portion of the Potomac River in the tidal reach. 132 A. at 50.[10]

10. *Middlekauff* was wrongly decided for three reasons. First, it ignored this Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), that West Virginia and its citizens were entitled as successors-in-interest to Virginia to rights under Article VII of the Compact of 1785. *Id.* at 580-81, 585. This holding clearly established that the Compact applies above the tidal portion of the Potomac River. The Court of Appeals in *Middlekauff* in 1926 failed to cite or mention the Supreme Court's ruling from 1910.

Second, clause four of the Black-Jenkins Award of 1877, which established the boundary between Maryland and Virginia beginning at the line separating Virginia from West Virginia, specifically recognized Virginia's right to the use of the River beyond the low-water mark on the Virginia shore as may be necessary to the full enjoyment of her riparian rights. App. D, Act of March 3, 1879, ch. 196, 20 Stat. 481, 482.

Finally, the underlying opinion of Chancellor Bland in *Binney's Case*, upon which the Court in *Middlekauff* relied, was rejected by the Black-Jenkins arbitrators in 1877. In their opinion accompanying the award, they stated: "We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we cannot help being influenced by our conviction *(Chancellor Bland notwithstanding)* that it applies *to the whole course of the river above the Great Falls as well as below*." App. C, Board of Arbitrators to Adjust the Boundary Line Between Maryland and Virginia: Opinions and Award of Arbitrators on the Maryland and Virginia Boundary Line at 16 (M'Gill & Witherow 1877) (emphasis added).

Because Maryland's highest court and its Attorney General have ignored Virginia's compact rights in the non-tidal reach of the Potomac, it would be futile to require that Virginia or its governmental subdivisions submit to lengthy administrative proceedings and subsequent judicial appeals. The result of that exercise has been pre-ordained.

Third, requiring Virginia to submit the determination of its compact claims (by proxy through the Authority) to a Maryland administrative agency or Maryland state courts is inconsistent with one of the central purposes of this Court's original jurisdiction: "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) (citing *Chisholm v. Georgia*, 2 Dall. 419, 475-476 (1793); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888)).[11] Given the positions taken to date by MDE, the Maryland Governor, the Maryland General Assembly, and the Maryland Court of Appeals, it is clear that parochial factors have already led to the reality, not to mention the appearance, of partiality to Maryland in this dispute.

Finally, where there is an ongoing injury to the State that seeks to invoke this Court's original jurisdiction, as in this case, it is not appropriate to defer to a pending proceeding in another forum. *Compare Arizona v. New Mexico*, 425 U.S. 794 (1976)

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11. The Court found that this concern did not apply in *Ohio v. Wyandotte Chemicals Corp.*, in which the State of Ohio sought to enjoin corporations in Michigan, Delaware and Canada from further polluting Lake Erie, because Ohio was free to pursue the same action in the courts of its own state, and Ohio courts could exercise personal jurisdiction over the defendants. 401 U.S. at 500. In this case, by contrast, the putative alternative forum to which Virginia would be relegated is a Maryland state administrative proceeding. Such a forum is particularly unacceptable when the dispute focuses on Virginia's rights as against Maryland's under their interstate compacts. "A State cannot be its own ultimate judge in a controversy with a sister State." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28.

(finding no ongoing injury to Arizona and declining original jurisdiction), *with Maryland v. Louisiana*, 451 U.S. 725 (1981) (finding ongoing injury to Maryland and other plaintiff states and granting leave to file the complaint). This is not a case like *Arizona v. New Mexico*, where Arizona was denied leave to file a complaint against New Mexico challenging the discriminatory impact of its energy tax. The three Arizona utilities affected by the tax were seeking a declaratory judgment in New Mexico state court that the tax was unconstitutional but, in the meantime, they chose not to pay it. 425 U.S. at 796. This Court later explained in *Maryland v. Louisiana* that the lack of an actual injury to Arizona was what justified declining original jurisdiction in that case in favor of the pending state lawsuit:

> It is also important to note that Arizona had itself not suffered any direct harm as of the time that it moved for leave to file a complaint since none of the utilities had yet paid the tax. Unlike the present case, it was highly uncertain whether Arizona's interest as a purchaser of electricity had been adversely affected.

451 U.S. at 743. In *Maryland v. Louisiana*, by contrast, the Court held that the challenge by eight states to Louisiana's "first use" tax on natural gas was appropriate for the Court's original jurisdiction because Louisiana, unlike New Mexico, required the tax to be paid pending a refund action, and limited the interest rate applicable should any refund be awarded. *Id.* at 743.

Similar to the plaintiff states in *Maryland v. Louisiana*, and unlike Arizona in *Arizona v. New Mexico*, Virginia is suffering actual, ongoing injury from Maryland's delay in issuing the Authority its waterway construction permit. The four-year delay in Maryland's Byzantine administrative process has already cost the Authority and its Virginia customers, including the Commonwealth of Virginia, hundreds of thousands of dollars a year in unnecessary solids treatment expenses that can never be recovered. Maryland's delay has also exposed the 1.2 million people in Virginia who consume Potomac River water to

increased health risks associated with highly turbid raw water drawn from the shoreline. Virginia should not have to wait for Maryland to decide whether a proposed public health project is "needed" in Virginia, particularly where, as here, Maryland does not contend that the construction would harm fishing or navigation, or otherwise interfere with the use of the River by Maryland. Maryland's four-year delay is long enough.

B. The Pending Maryland Administrative Proceeding Will Not Resolve Whether Maryland's Water Appropriation Permitting System Violates Virginia's Compact Rights.

The Authority was issued a water appropriation permit by Maryland in April 1996 and the validity of Maryland's water appropriation permitting system as applied to Virginia's use of the Potomac River is not at issue in the pending administrative proceeding. Thus, that proceeding is not an alternative forum to resolve Virginia's claim that Maryland's water appropriation permitting system violates Virginia's interstate compact rights.

Even though Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River, Maryland insists that Virginia and its governmental subdivisions — including the Authority and the Town of Leesburg — apply for water appropriation permits before taking any water from the River. Maryland's permitting process can be very time consuming and dilatory. For instance, MDE took approximately one year to act on the most recent request by the Town of Leesburg, Virginia, for an increase in its water appropriation permit from 5 to 10 million gallons a day.

The fact that Maryland has not yet denied a water appropriation permit to a Virginia user does not obviate the need for this Court to decide whether Maryland has the power to regulate Virginia's water withdrawals. The failure or refusal to apply for a water appropriation permit from Maryland exposes Virginia's state and local officials and citizens to potential criminal prosecution in Maryland state courts. Md. Code Ann., Envir. § 5-514 (1996). This court should permit Virginia to challenge Maryland's illegal efforts to regulate Virginia's water

withdrawals from the Potomac River, lest Maryland one day argue that its continuing efforts to subject Virginia to its permitting regime have ripened into a de facto amendment to the compacts formally executed between these two sovereigns. Maryland should not be permitted to infringe Virginia's right to use the Potomac River simply because Maryland has, to date, condescended to issue water appropriation permits to Virginia users.

CONCLUSION

The Court should grant Virginia's motion for leave to file the Complaint and refer this case to a special master, consistent with its procedures for original action cases. The Commonwealth of Virginia further requests that the Court:

1. Declare that Virginia's right to use the Potomac River and to construct improvements appurtenant to the shore applies upstream of the tidal reach of the Potomac River, as established by Clause IV of the Black-Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958;

2. Declare that Maryland may not require that Virginia, its governmental subdivisions, or its citizens obtain a Maryland waterway construction permit in order to build improvements appurtenant to their properties on the Virginia shore of the Potomac River;

3. Enjoin Maryland from requiring the Fairfax County Water Authority to obtain a waterway construction permit for its proposed offshore intake project;

4. Enjoin Maryland from requiring Virginia, its political subdivisions, or its citizens to obtain water appropriation permits to withdraw water from the Potomac River; and

5. Award Virginia such damages, costs and further relief as this Court deems just and proper.

Respectfully submitted,

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February 18, 2000

BILL OF COMPLAINT

No. __, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

BILL OF COMPLAINT

The Commonwealth of Virginia, by its Attorney General, Mark L. Earley, brings suit against the State of Maryland, and in support of its cause of action states as follows:

1. The Commonwealth of Virginia and more than 1.2 million of its people are suffering present irreparable harm from the actions of the State of Maryland in violation of interstate compacts and in violation of the rights of Virginia and her citizens to fair use of the waters of the Potomac River.

2. The filing of this Complaint has been authorized by the Governor of Virginia.

3. Virginia brings this action against Maryland in Virginia's own right as a party to the Black-Jenkins Award of 1877, the Potomac River Compact of 1958, Article VII of the Compact of 1785, and the Potomac River Low Flow Allocation Agreement (the "LFAA"). The LFAA, dated January 11, 1978, was made by the United States of America, Virginia, Maryland, the District of Columbia, the Fairfax County Water Authority, and the Washington Suburban Sanitary Commission. Virginia also brings this action as *parens patriae* on behalf of more than 1.2 million consumers in Virginia who receive water drawn from the Potomac River for drinking, fire protection and other uses, from the Fairfax County Water Authority and the Town of Leesburg, as well as on behalf of all other Virginia citizens and residents who may receive Potomac River water from these or other Virginia political subdivisions or water purveyors in the future. Virginia also brings this action in her own right as a direct consumer of Potomac River water in more than 100 locations in the counties of Fairfax, Prince William and Loudoun, and the cities of Fairfax and Alexandria.

4. This Court has exclusive, original jurisdiction of this action under Art. III, § 2, cl. 2 of the Constitution of the United States, and 28 U.S.C. § 1251.

History of Interstate Compacts and Agreements Between Virginia and Maryland Concerning the Potomac River

5. The Potomac River (the "Potomac" or "River") is an interstate river. The River rises in Virginia, West Virginia,

Maryland, the District of Columbia and Pennsylvania. Approximately thirty-six per cent of the area of the Potomac River watershed above its tidal reach lies in Virginia, and substantially more of the water in the River originates from drainage areas in Virginia than from sources in any other State in the watershed. The River provides a source of drinking water to more than 3.5 million people in the Washington metropolitan area.

6. From just below Harper's Ferry, West Virginia, where the main stem of the Potomac and the Shenandoah River converge, to Smith's Point, Virginia, where the Potomac enters the Chesapeake Bay, the mean low water mark on the south bank of the Potomac is the boundary line between Virginia and Maryland, as established by the Black-Jenkins Award of 1877, and consented to by Congress in 1879. Act of March 3, 1879, ch. 196, 20 Stat. 481, 482. (App. D).

7. Since Colonial times, disputes have arisen periodically between Virginia and Maryland regarding each State's respective rights to the Potomac River.

8. Commissioners appointed by Virginia and Maryland met in March 1785 and agreed upon thirteen articles. The resulting Compact of 1785 was subsequently approved by the legislatures of both States. (App. A). Article VII of the Compact provided:

> The citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the

> navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states. Provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other. . . .

9. The Compact of 1785 did not determine the boundary between the States. In 1874, Virginia and Maryland mutually authorized the submission to binding arbitration of the issue of the true boundary line between them. The arbitrators' award, known as the Black-Jenkins Award, established the boundary line at the low-water mark on the Virginia shore of the Potomac. However, the Fourth Clause of the award provided as follows:

> Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

Both states ratified the Award and Congress consented to it in 1879. Act of March 3, 1879, ch. 196, 20 Stat. 481, 482. (App. D).

10. In 1957, Maryland sought unilaterally to abrogate the Compact of 1785 and to exercise jurisdiction in the tidal

portions of the Potomac River without concurrence from Virginia. Virginia responded by filing an original action against Maryland in this Court. This Court granted Virginia's motion for leave to file the complaint. *Virginia v. Maryland*, 355 U.S. 269 (1957). The Court appointed retired Mr. Justice Stanley Reed as special master. 355 U.S. 946 (1958). The two States resolved their disputes by agreeing to the Potomac River Compact of 1958 (App. E), which was subsequently consented to by Congress. Potomac River Compact of 1958, Pub. L. No. 87-783, 76 Stat. 797 (1962). Article VII, section 1 of the new Compact expressly affirmed the rights of Virginians to the use of the River that had been protected by Article VII of the Compact of 1785, including the right to build wharves and improvements into the River from the Virginia shore.

Cooperation Among the States and the Washington Metropolitan Area's Water Suppliers

11. From 1958 until the events that gave rise to the present dispute, Virginia and Maryland enjoyed a period of cooperation concerning the use of the Potomac River. The three major water suppliers to the Washington metropolitan area are the Washington Aqueduct Division of the U.S. Army Corps of Engineers (the "Aqueduct"), the Washington Suburban Sanitary Commission ("WSSC"), a governmental subdivision of the State of Maryland, and the Fairfax County Water Authority (the "Authority"), a governmental subdivision of the Commonwealth of Virginia. The WSSC supplies Montgomery County and Prince George's County, Maryland, with treated water drawn from the Potomac River and the Patuxent Reservoir. The Aqueduct provides treated water drawn from the Potomac River for the District of Columbia and portions of northern Virginia, including

Arlington County, the City of Falls Church and eastern Fairfax County. The Authority provides treated water for most of the remainder of northern Virginia, about one-half being drawn from the Potomac River and the balance from the Occoquan River Reservoir in southern Fairfax County.

12. In 1978, Virginia and Maryland signed the LFAA (App. F) as a necessary first step, required by 42 U.S.C. § 1962d-11a, to the investment of large sums of money by the Authority and the WSSC to build facilities to withdraw and treat water from the Potomac River to serve fast-growing populations on both sides of the River. In the LFAA (App. F), Maryland acknowledged that Virginia and "communities located in Virginia" have riparian rights in the River. The LFAA allocates the flow in the River among the "users" of the River at times when the flow is inadequate to supply the full needs of all of the users. The "users" expressly include "the Commonwealth [of Virginia] for and on behalf of herself and each of her political subdivisions and authorities (including the Authority.)" Portions of the LFAA, as amended in July 1982 and executed by the Governors of both participating States and the Mayor of the District of Columbia, are premised upon the existence of a legally enforceable agreement between the Authority, WSSC and the Aqueduct "for the regional management of all of their water supply facilities for the benefit of the Washington Metropolitan Area."

13. Contemporaneously with the 1982 amendments to the LFAA, the Aqueduct, the WSSC, the District of Columbia, the Authority, and the Interstate Commission on the Potomac River Basin Section for Cooperative Water Supply Operations in the Potomac ("Co-Op"), entered into a Water Supply Coordination Agreement. (App. G). The Agreement,

administered by the Co-Op, is designed to ensure a sufficient water supply for the Washington metropolitan area in the future. During periods of low flow in the River, the Co-Op coordinates the utilities' withdrawals from the River so as to minimize the need to invoke any restrictions on withdrawals under the LFAA. The parties also agreed to periodically project the future water demands for the Washington metropolitan area, and the WSSC, the Authority and the District of Columbia agreed to share the costs of construction, operation and maintenance of additional water supplies that might be needed to avoid water shortages in the future. The Co-Op and the water utilities are presently engaged in a water demand study for the year 2020.

14. In 1982, concurrently with the execution of the Water Supply Coordination Agreement, the Aqueduct, the WSSC, the Authority and the District of Columbia also entered into a series of other cost-sharing agreements to provide storage capacity in upstream reservoirs in Maryland and West Virginia, in order to supplement the supply of water for the Potomac River in times of low flow. To date, Virginia customers of the Authority, including the Commonwealth of Virginia, have contributed under the various cost-sharing agreements in excess of $7 million to the capital, operating and maintenance costs of those upstream reservoirs. Water stored in the reservoirs was used for the first time during the summer drought of 1999 to supplement the flow of the Potomac River, avoiding the need for any restrictions on water withdrawals pursuant to the LFAA. The coordinated operation of the region's water resources will enable the utilities to meet the area's demands, without imposing restrictions, through at least the year 2015, even under repeated recurrences of the historic drought of record. The system of cooperation between the water suppliers in the Washington metropolitan area has served as a model for the Nation.

The Present Controversy

15. Maryland requires that any person seeking to construct an improvement in the Potomac River obtain a waterway construction permit from the Maryland Department of Environment ("MDE"). Md. Code Ann., Envir. §§ 5-504, 5-507 (1996); Md. Regs. Code tit. 26, § 26.17.04 (1999). Maryland also requires that any person seeking to withdraw water from the Potomac River obtain a water appropriation permit from MDE. Md. Code Ann., Envir. § 5-502 (1996); Md. Regs. Code tit. 26, § 26.17.06.03 (1999). MDE purports to retain the authority to deny a permit application if it determines in its sole discretion that a waterway construction project, or water appropriation request, is "unnecessary." A violation of the Maryland permitting statutes or regulations constitutes a misdemeanor, subject to a fine up to $500 per day for each day of the offense, not to exceed a total fine of $25,000. Md. Code Ann., Envir. § 5-514 (1996).

Maryland's Waterway Construction Permitting Process is Invalid as Applied to Virginia

16. Maryland's waterway construction permit procedure is invalid as applied to Virginia. Under its compacts with Maryland and pursuant to the Black-Jenkins Award, Virginia, her governmental subdivisions and her citizens have the right to the full use of the Potomac River beyond the low-water mark on the Virginia shore, including the privilege of erecting wharves and other improvements, as long as such use does not impair navigation, harm fisheries, or otherwise interfere with the use of the River by Maryland.

17. As set forth below, an actual controversy exists between Virginia and Maryland with respect to the rights of

Virginia and her riparian communities to construct improvements appurtenant to the Virginia shore of the Potomac River.

Virginia's Need for an Offshore Drinking Water Intake

18. The Fairfax County Water Authority provides drinking water to approximately 1.2 million people in Northern Virginia, including many of the people who live and/or work in Fairfax County, Loudoun County, Prince William County, the City of Alexandria, Dulles Airport, Fort Belvoir and the Lorton Reformatory.

19. The Authority presently withdraws water from the Potomac River at a site along the Virginia shoreline in Loudoun County, Virginia. The existing shoreline intake is clogged from time to time by grass, leaves, and ice. In addition, following local rainstorms, when the River is influenced by runoff from several upstream tributaries, water withdrawn at the shoreline is more difficult to treat than water in the main channel due to high turbidity (a measurement of the amount of particulate matter suspended in the water), and low pH and alkalinity. The substantial quantities of solids that must be removed from the water at the treatment plant and trucked off-site also cause a considerable expense.

20. A comprehensive study of the Authority's operations by an outside engineering firm concluded that the Authority should construct an alternative intake 725 feet offshore from the existing intake, in the main channel of the River. The Potomac River is 2000 feet wide at that point. Offshore intakes to supplement shoreline intakes are common across the country. The study determined that an alternative,

offshore intake would reduce, if not eliminate, the Authority's operational problems due to clogging at the shore intake, reduce solids loading at the treatment plant by 40% to 50%, and dramatically improve the quality of the raw water. The present value associated with the reduction in solids disposal and chemical treatment costs alone exceeds $13 million. This economic value would inure to the benefit of the Authority and its customers, including the Commonwealth herself.

21. The Authority's proposed offshore intake would also provide significant public health benefits to Virginia. The Authority's present intake at the Virginia shoreline is adversely affected by runoff from upstream tributaries following local rainstorms. Mean turbidity at the shore is 50% greater than in the channel of the river. When local rainfall exceeds 1/2 inch, mean and median turbidity and suspended solids at the Authority's shore intake are more than four times greater than in the channel of the river, where turbidity and suspended solids levels change very little. These conditions significantly interfere with the smooth operation of the water treatment plant and greatly increase the risk of human error in producing finished drinking water free of contaminants. The WSSC's water intake on the Maryland shore, just downstream from Watt's Branch, experiences even poorer water quality from local runoff in Maryland. Mean turbidity at the WSSC's shore intake is more than 30% greater than at the Authority's shore intake.

22. Although the Authority currently produces finished drinking water that complies with all federal and state water quality standards, high turbidity in raw water following local rainstorms is associated with elevated levels of waterborne pathogens, including *Cryptosporidium* and *Giardia*. The

species *Cryptosporidium parvum* is infectious to humans and causes the disease Cryptosporidiosis. There is no current treatment for Cryptosporidiosis, a disease that causes extreme gastrointestinal illness in healthy persons and poses a risk of death for immuno-compromised individuals. An outbreak of Cryptosporidiosis in 1993 in the City of Milwaukee, attributed to contaminated source water from Lake Michigan, caused more than 100 deaths and in excess of 400,000 gastrointestinal illnesses. All waterborne outbreaks of Cryptosporidiosis detected to date, including the 1993 Milwaukee incident, occurred in communities where water utilities used conventional filtration systems that met all state and federal standards for acceptable water quality. The Authority's construction of an offshore intake is necessary to approach the Maximum Contaminant Level Goal of zero for *Cryptosporidium* that was set by the Environmental Protection Agency in its Interim Enhanced Surface Water Treatment Rule, 63 Fed. Reg. 69,478, 69,484-85 (Dec. 16, 1998), *codified at* 40 C.F.R. § 141.52(5) (1999).

23. The disinfection of highly turbid raw water during the water treatment process also generates the production of disinfection byproducts that are known to be animal carcinogens and suspected to be human carcinogens.

24. Using better quality source water both reduces the quantity of such disinfection byproducts in the finished drinking water and provides an additional barrier in the treatment process against waterborne pathogens.

25. Virginia Health Department regulations require the Authority to select the cleanest possible source water. 12 Va. Admin. Code § 5-590-820 (1999). The Virginia

Commissioner of Health has specifically found that the construction of the offshore intake is an essential public health measure for the more than 1.2 million people in Virginia who receive drinking water from the Authority. (App. K).

Maryland Obstructs, Delays and Withholds the Authority's Waterway Construction Permit

26. On January 4, 1996, the Authority applied for all necessary federal and state permits to construct the offshore intake. The Authority applied for federal permits to the United States Army Corps of Engineers, pursuant to § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and § 404 of the Clean Water Act, 33 U.S.C. § 1344. Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), further required that the Authority, as a condition of obtaining its federal permits, also obtain a water quality certification from the State of Maryland that the construction would not result in a discharge that would violate Maryland water quality standards (the "Section 401 Water Quality Certification").

27. The Authority applied for three permits from the State of Maryland through MDE: a waterway construction permit, an amendment to the Authority's water appropriation permit to take water from a different location than the shore, and the Section 401 Water Quality Certification.

28. The Authority's water appropriation permit amendment was granted by the Water Management Administration of MDE in April 1996, authorizing withdrawal of water from the proposed offshore location.

29. MDE delayed approving either the waterway construction permit or the Section 401 Water Quality Certification.

30. The Army Corps of Engineers granted the necessary federal permits on January 31, 1997, finding that the Authority's offshore intake project posed "minimal environmental consequence." (App. H).

31. Nonetheless, MDE continued to delay acting on the Authority's remaining permit requests. After the Authority's application had been pending with MDE for more than a year, the offshore intake project became politically controversial. Various Maryland state legislators objected to the Authority's offshore intake project and began to pressure MDE to withhold and deny the permits.

32. For instance, on May 19, 1997, Maryland General Assembly Delegate Jean Cryor (Montgomery County) urged Maryland's Secretary of Environment, Jane T. Nishida, to withhold the Authority's permits, complaining that the Potomac River was "being used as a resource for Virginia's continuing economic development." (App. J). Delegate Cryor's efforts caused MDE to hold a public information hearing. At that hearing on May 21, 1997, Delegate Cryor vowed publicly that she would work to prevent the Authority's offshore intake from ever being constructed. State Senator Jean W. Roesser (Montgomery County) likewise opposed the project and stated at the hearing that "we should call a spade a spade" and "have a clear understanding that this expanded intake accommodates Virginia's massive growth."

33. On October 21, 1997, before MDE had announced its decision on the Authority's permit application, a letter to

the editor appeared in *The Fairfax Journal* from one Montgomery County, Maryland constituent, stating:

> Fairfax County residents don't know it, but Maryland has just cut your water off. Five Montgomery County representatives to the Maryland General Assembly (state senators Brian Frosh, Jean Rosser, and P.J. Hogan, and delegates Jean Cryor and Ray Beck) prevailed upon the Maryland Water Management Administration to reject the Fairfax County Water Authority request for construction of a mid-Potomac River water intake, within Maryland boundaries.

J. Webb, "Maryland Water Belongs There," *The Fairfax Journal* (Oct. 21, 1997).

34. In fact, following substantial political pressure from these and other Maryland state legislators, as well as from the Governor of Maryland himself, MDE's Water Management Administration ("WMA") announced its denial of the Authority's waterway construction permit on December 10, 1997, and refused to act on the Authority's request for a Section 401 Water Quality Certification. (App. L). WMA claimed that the Authority did not "need" the offshore intake project because it already had a water intake along the Virginia shoreline. Upon information and belief, this was the first time that MDE had ever denied a waterway construction permit to any applicant for any construction in the Potomac River.

35. Although the Governor of Maryland has no role under Maryland law in the granting or denying of waterway construction permits, the present Governor took credit for

causing the permit to be denied in a February 1998 letter to one of his constituents. (App. M). Similarly, Delegate Cryor has claimed publicly on her Internet website that her efforts were instrumental in causing MDE to withhold the Authority's Maryland permits.

36. Since December 1997, the Authority has been enmeshed in convoluted administrative proceedings before the MDE with no final resolution in sight. To contest MDE's actions under Maryland law, the Authority had to submit to a "contested case hearing" procedure before an Administrative Law Judge ("ALJ") from the Maryland Office of Administrative Hearings. Under this procedure, the ALJ makes proposed findings of fact and conclusions of law to MDE, but those findings are not binding on the agency. A "Final Decision Maker" appointed by Secretary Nishida, the Secretary of MDE, makes the ultimate determination for MDE as to whether the permit will issue. Thus, the same agency that withheld the Authority's permits in the first place is directed to make the "final decision" whether to issue the permit.

37. MDE has stipulated during the contested case hearing process that the Authority's proposed offshore intake will not harm any aesthetic or boating interests, and that it will not interfere with Potomac River fisheries. (App. N). MDE has conceded that the Project will save the Authority significant expense associated with solids-handling costs. MDE has also stipulated that Maryland waived its ability to withhold the Section 401 Water Quality Certification because, pursuant to 33 U.S.C. § 1341, Maryland failed to act for more than a year on the Authority's application. (App. O). Nonetheless, MDE continues to withhold the waterway construction permit, maintaining that the offshore intake is "unneeded" by Virginia because the Authority is

already withdrawing and treating an adequate quantity of water from its shoreline intake to supply Virginia users. MDE further contends that, instead of the Authority's constructing the offshore intake, the Commonwealth of Virginia should take steps to eliminate the sources of sediment that impair water quality at the shoreline, even though water quality along the Maryland shoreline at the WSSC's water intake is demonstrably worse than on the Virginia side.

38. The Maryland ALJ has precluded the Authority during the contested case hearing process from introducing any evidence to show that MDE's permit decision was the result of improper political influence. Nonetheless, in January 1999, after the close of MDE's case-in-chief, the ALJ ruled that the Authority's waterway construction permit should be issued. Without ruling on the Authority's compact arguments, the ALJ found that MDE was unable to demonstrate that construction of the Authority's proposed offshore intake would have any significant environmental impact.

39. MDE's "Final Decision Maker" in June 1999 rejected the ALJ's determination and remanded the case for additional hearings. (App. P). MDE's Final Decision Maker directed the ALJ to hear evidence as to whether the Authority "needs" the offshore intake structure. Like the ALJ, the Final Decision Maker refused to rule on the Authority's compact arguments that Maryland did not have the right to determine for Virginia whether the offshore intake was necessary. The contested case hearing was reconvened in November 1999, and the ALJ has taken the case under advisement.

40. Throughout the contested case hearing process, various Maryland State legislators have continued to exert

pressure and influence on MDE to withhold the Authority's waterway construction permit, even if the ALJ ultimately recommends to MDE that the permit be issued.

41. On February 3, 2000, Delegate Cryor introduced legislation in the Maryland General Assembly with 30 co-sponsors that would prohibit the construction of new water intake structures in the Potomac River until unnamed "studies" are completed at some indeterminate time in the future. (App. U, House Bill 395, Md. House of Delegates, introduced February 3, 2000). A companion bill has been introduced in the Maryland Senate. (App. V, Senate Bill 729, Md. Senate, introduced February 4, 2000). Delegate Cryor's proposed bill would forever prohibit the construction of any new intake in the Potomac River unless it is a replacement for an existing water intake, thereby effectively preventing *any* new water intake structures from being constructed by Virginia, its political subdivisions or its citizens. Delegate Cryor specifically intends her bill to prohibit the Authority's offshore intake, and the conditions set forth in her bill are tailored to accomplish that purpose, while purporting to be facially neutral. The companion Senate Bill would likewise delay indefinitely any action on the Authority's permit application. Although it purports to allow a permit to be issued pending the completion of various studies at some indefinite time in the future, the bill is intended and tailored to force the Authority to reduce drastically the capacity of its proposed offshore intake structure. Both the House and the Senate versions of the bill would prohibit MDE from issuing the Authority's waterway construction permit.

42. Although most bills in the Maryland General Assembly, if enacted, become effective October 1 of the same year, both of these bills have an early effective date of

June 1, 2000. This early effective date is intended to preempt the contested case hearing before MDE in which the Authority is presently engaged so as to ensure that the Authority's permit application is delayed or denied. Similar legislation passed both houses of the Maryland General Assembly in 1999 but failed to become law only because the two houses were unable to resolve small differences in their respective bills in the minutes before the legislative session ended at midnight on April 12, 1999.

43. The Authority's application to construct the offshore intake has been pending with MDE for more than four years. The delay has cost the Authority and its Virginia customers, including the Commonwealth of Virginia, hundreds of thousands of dollars per year in unnecessary solids treatment costs, which can never be recovered. The delay has also exposed and continues to expose Virginia water users to the risk of interrupted water supply, elevated levels of disinfection byproducts, and waterborne pathogens that elude current treatment capabilities.

44. On November 30, 1999, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or concur that permit approval was not required under the interstate compacts between Maryland and Virginia. (App. S). On January 4, 2000, the Attorney General of Maryland responded, contending that the highest court of Maryland had already determined that Virginia's compact rights were inapplicable to the non-tidal reach of the Potomac River, and that, even if they were applicable, Maryland would still have the right to regulate Virginia's use of the River. (App. T). The Attorney General of Virginia subsequently conferred with the Maryland Attorney General, both in person and by

telephone, prior to filing this action, and was informed that Maryland would not change its position. All reasonable efforts to resolve this dispute by negotiation or agreement have been exhausted.

Maryland's Water Appropriation Permitting Process is Invalid as Applied to Virginia

45. An existing case and controversy also exists with respect to the validity of Maryland's water appropriation permitting system as applied to Virginia. Even though Maryland has not, to date, denied any Virginia user a permit to appropriate water from the Potomac River, Maryland purports to require that Virginia and its governmental subdivisions, including the Authority and the Town of Leesburg, apply for water appropriation permits before withdrawing any such water. The permitting process can be very time consuming and is subject to delay and undue influence by Maryland politicians opposed to water withdrawals by Virginia. MDE's Water Management Administration took approximately one year to act on the most recent request by the Town of Leesburg, Virginia, for an increase in its water appropriation permit from 5 million gallons per day ("MGD") to 10 MGD.

46. Maryland's water appropriation permit procedure is invalid as applied to Virginia. Maryland has no unilateral right to determine how much water Virginia and her riparian communities may withdraw from the River. Maryland does not own the water in the River. Virginia's right to withdraw water from the Potomac River is governed by the LFAA, the Fourth Clause of the Black-Jenkins Award, Article VII, Section 1 of the Potomac River Compact of 1958, Article VII of the Compact of 1785, and federal common law principles of equitable apportionment.

47. The failure or refusal of Virginia, its political subdivisions or its citizens to apply for a waterway construction permit or water appropriation permit from Maryland exposes Virginia's state and local officials and citizens to potential criminal prosecution in Maryland state courts.

48. Maryland's state permitting laws violate Maryland's interstate compact obligations, infringe upon Virginia's sovereignty, and impede and interfere with Virginia's rights of access to the Potomac River.

PRAYER FOR RELIEF

WHEREFORE, the Commonwealth of Virginia prays that the Court:

1. Declare that Virginia's right to use the Potomac River and to construct improvements appurtenant to the Virginia shore applies upstream of the tidal reach of the Potomac River, as established by Clause IV of the Black-Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958;

2. Declare that Maryland may not require that Virginia, its governmental subdivisions, or its citizens obtain a Maryland waterway construction permit in order to build improvements appurtenant to their properties on the Virginia shore of the Potomac River;

3. Enjoin Maryland from requiring the Authority to obtain a waterway construction permit for its proposed offshore intake project;

4. Enjoin Maryland from requiring Virginia, its political subdivisions, or its citizens to obtain water appropriation permits to withdraw water from the Potomac River; and

5. Award Virginia such damages, costs and further relief as this Court deems just and proper.

Respectfully submitted,

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